UNITED NATIONS

AT

Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 764

Case No. 829: SIMATOS

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Luis de Posadas Montero, Vice-President, presiding; Mr. Mayer Gabay; Ms. Deborah Taylor Ashford;

Whereas at the request of Rose Simatos, a staff member of the United Nations Children's Fund (hereinafter referred to as UNICEF), the President of the Tribunal, with the agreement of the Respondent, extended the time-limit for the filing of an application to the Tribunal to 31 January 1995;

Whereas, on 14 December 1994, the Applicant filed an application requesting the Tribunal, inter alia:

"To order that:

(a) The Applicant be given fair and proper consideration for all posts where Applicant applies and meets the minimum requirements, and not to be excluded in order to bring the number of candidates down to a manageable short list;

(b) Applicant receive payment of compensation for the moral suffering and for unfair practices inflicted on the Applicant in an amount equivalent to two years' net base salary at P2/XI;

(c) Applicant receive payment of compensation for the disruption to the Applicant's career ... equivalent to four years' net base salary at grade P2/XI."

Whereas the Respondent filed his answer on 27 January 1995;

Whereas the Applicant filed written observations on 1 March 1995;

Whereas the facts in the case are as follows:

The Applicant entered the service of UNICEF on 23 April 1973, as a Clerk/Typist in the Supply Division, on a three-month fixed-term appointment at the G-2 level. On 23 July 1973, the Applicant was granted a probationary appointment which became permanent on 1 April 1975. On 1 October 1973, she was promoted to the G-3 level, and on 1 January 1977, to the G-4 level, as a Personnel Clerk in the Division of Personnel. In June 1979, the Applicant transferred to the Staff Development and Training Section of the Personnel Division. On 1 January 1983, she was promoted to the G-5 level, as a Training Assistant. On 1 May 1987, she was promoted to the G-7 level, as Senior Training Assistant.

On 1 April 1993, the Applicant applied for the P-2 level post of Assistant Recruitment Officer. Thirty-four candidates in all applied for the post, twenty-six of whom were UNICEF staff members. The Recruitment and Placement Section (RPS) reviewed the candidates and compiled an initial short-listing. The Chief of RPS, who was also the supervisor of the post, presented his recommendation to the Selection Advisory Panel (SAP), which, on 27 April 1993, concurred with his recommendation. On 30 April 1993, the Appointment and Promotion Committee (APC) endorsed the SAP's recommendation. On the same day, the Deputy Executive Director (Operations) approved it.

On 5 May 1993, a Recruitment and Staff Development Officer informed the Applicant that another candidate had been selected for the post. In a memorandum dated 18 May 1993, the Applicant requested from the Chief of RPS a copy of the Minutes of the meeting of the APC at which it adopted its recommendation. In a reply dated 19 May 1993, a Recruitment Officer informed the Applicant, "as you

were not among the short-listed candidates, there are no specific excerpts from the APC minutes pertaining to your case."

In a memorandum dated 21 May 1993, to the Recruitment Officer, the Applicant stated, "I was astonished to learn that I was not among the short-listed candidates", as she had in the past performed the functions of the post. Noting that this was her fourth unsuccessful application for the post, she requested the reasons why, unlike others, she had not been short-listed.

In a reply dated 25 May 1993, the Chief, RPS, advised the Applicant that "since there were thirty-four candidates for this vacant post, a great effort had to be made to bring the number down to that of a short-list. Rest assured that your qualifications received a great deal of consideration, and that by consensus the selected candidate was found to be best suited for the post. The Executive Director concurred with this recommendation."

On 14 June 1993, the Applicant requested the Executive Director to review the decision not to select, or even to short-list, her for the post. In a reply dated 12 July 1993, the Deputy Executive Director (Operations) informed the Applicant that "after considering the full list of applicants, inclusive of yourself, as well as the short-listing done by the Recruitment Section, the Panel concurred with the recommendation of the supervisor for the selection of an applicant other than yourself." She noted that the candidate selected "fulfilled all the qualifications for the post and was already at the professional level."

On 4 August 1993, the Applicant lodged an appeal with the Joint Appeals Board (JAB). The JAB adopted its report on 10 March 1994. Its conclusions and recommendations read, in part, as follows:

> "25. ... under UNICEF's procedures, the SAP evaluates all qualified candidates for a particular post and, following such evaluation process, makes a recommendation, in this

instance, to the APC, for the selection of a specific candidate for such post. UNICEF's procedures further specify that the SAP is to provide the APC with, among other documentation, 'the findings and recommendations of the [SAP] on all qualified candidates.'

26. Respondent's description of the procedures used to fill the subject vacancy are inconsistent with the procedures described in the UNICEF Personnel Administration Manual. Respondent states that '[t]he Recruitment Section did an initial prescreening and short-listing and presented its findings to the SAP, along with the full list of applicants, inclusive of the Appellant.' Inasmuch as Appellant was among the candidates submitted to the SAP, based on UNICEF's procedures, Appellant was considered by the RSDS [Recruitment and Staff Development Section] to be a qualified candidate for the subject vacancy. Under UNICEF's procedures, the SAP is required to evaluate all qualified candidates and present the APC with its findings and recommendations on all qualified candidates. UNICEF's procedures do not authorize the SAP to eliminate qualified candidates from consideration by the APC. Under UNICEF's procedures, therefore, documentation on Appellant should have been provided to the APC. The SAP's failure to provide the APC with documentation on the Appellant (i.e., the SAP's findings and recommendations with respect to the Appellant, her fact sheet, her last performance evaluation report and, if indeed, the last four PER's and other data of a performance related nature from her Official Status File), whom the RSDS submitted to the SAP and thus had found to be a qualified candidate, was a breach of UNICEF's procedures.

27. Respondent states that '[t]he SAP did indeed provide to the APC findings on all those they considered to be qualified.' Under UNICEF's procedures, however, the SAP does not determine whether applicants are 'qualified candidates.' According to paragraph 4.3.6, this responsibility rests with the RSDS. The SAP evaluates all qualified candidates and must present documentation on all qualified candidates to the APC.

Recommendations

28. As compensation for having been unfairly excluded from proper consideration for the subject vacancy, the Panel recommends, as requested by Appellant, that UNICEF identify another core post in New York for consideration of Appellant's candidacy. The Panel notes, however, that Appellant already has the right to apply and be considered

for UNICEF posts so such recommendation affords Appellant nothing more than that to which she is already entitled.

29. Although the Panel does not know whether consideration of Appellant's candidacy by the APC would have resulted in the selection of Appellant to fill the subject vacancy, Appellant was eliminated at an earlier stage from consideration by the APC as a result of UNICEF's breach of its procedures. The Panel recommends, as compensation for UNICEF's breach of its own procedures and the harm to Appellant resulting from UNICEF's failure to give her candidacy proper and fair consideration, that Appellant be compensated in the amount of $1,000.00."

On 28 June 1994, the Under-Secretary-General for Administration and Management transmitted a copy of the JAB report to the Applicant and informed her as follows:

"In accordance with standard UNICEF application of the procedures in the Personnel Administration Manual (PAM) to the selection for a professional post, your name was not submitted to either the Selection Advisory Panel (SAP) or the Appointment and Placement Committee (APC) as a 'qualified' candidate, as UNICEF regularly and consistently equates 'qualified' as 'short-listed' in the professional selection process. Although your name was submitted as an applicant, full supporting documentation concerning your application was not transmitted to either the SAP or the APC, as you were not a short-listed candidate.

In the light of this finding, the Secretary-General has determined that there was no breach of procedures in your case. In making this determination, the Secretary-General was aware of the careful consideration given to your case by the Board. However, he felt that re-examination was warranted as the Board's analysis and recommendation were based on an incorrect premise - that full supporting documentation concerning your application was submitted to the level of the SAP as if you had been determined to be a 'qualified' candidate and that there was a failure thereafter to similarly submit to the APC.

In making his determination, the Secretary-General found that there was no evidence of discriminatory measures being taken in your case and that, clearly, no special procedure was adopted. He took note of the fact that, as the selection in your case involved a post in the Division of Personnel,

two members of the APC, instead of the usual one representative, were on the SAP to ensure transparency.

The Secretary-General has also determined that clarity is needed in the terminology of the PAM and he is requesting UNICEF to review the text and to make appropriate revisions. The Secretary-General is also requesting UNICEF to re-examine its application of procedures and to give consideration to the transmittal of fact sheets on all internal applicants to the SAP and APC.

The Secretary-General has lastly taken note that your original statement of appeal did not question procedures but addressed the issue of why you were not short listed for the post in question. The Secretary-General has noted and is in agreement with the conclusion of the Joint Appeals Board, and its citation of Administrative Tribunal jurisprudence, that the selection of a staff member for a particular post or for promotion rests within the discretionary authority of the Secretary-General.

In the light of the above, the Secretary-General has decided not to accept the Board 's conclusion that there was a breach of procedure by UNICEF in your case or its consequent recommendation that you be paid compensation."

On 14 December 1994, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Applicant was not given due consideration for promotion in accordance with UN Staff Rules and Regulations and UNICEF administrative issuances. This constituted a denial of due process.

2. Proper consideration by the APC is central to appointments. The Applicant was denied such consideration for a post for which she is qualified and whose functions she had previously performed.

3. UNICEF's interpretation of "all qualified candidates" contradicts the Personnel Administration Manual and led to the

Applicant's exclusion from fair and proper consideration for promotion.

Whereas the Respondent's principal contentions are:

1. The Applicant has no right to promotion but only a right to be considered for promotion.

2. The Applicant was fully and fairly considered for promotion in accordance with the applicable procedures.

The Tribunal, having deliberated from 8 to 26 July 1996, now pronounces the following judgement:

I. The Applicant appeals a decision by the Secretary-General, rejecting the recommendation of the JAB to award the Applicant $1,000 as compensation for the Respondent's "failure to give [the Applicant's] candidacy proper and fair consideration". In his decision, the Secretary-General admitted that "In accordance with standard UNICEF application of the procedures in the Personnel Administration Manual (PAM) to the selection for a professional post, your [the Applicant's] name was not submitted to either the Selection Advisory Panel (SAP) or the Appointment and Promotion Committee (APC) as a 'qualified' candidate, as UNICEF regularly and consistently equates 'qualified'' as 'short-listed' in the professional selection process. Although your name was submitted as an applicant, full supporting documentation concerning your application was not transmitted to either the SAP or the APC, as you [the Applicant] are <u>not</u> a short-listed candidate".

II. In her submission, the Applicant claims that she was not fairly and fully considered for the P-2 post for which she had applied. She also contends that the Respondent did not follow the

relevant rules set forth in the UNICEF Personnel Administration Manual.

III. According to the UNICEF Personnel Administration Manual, the selection process is conducted as follows: (a) candidates submit their applications (Rule 4.3.4); (b) the Recruitment and Staff Development Section (RSDS) prepares a list of at least three qualified candidates. At the same time, the supervisor makes his or her recommendation (Rule 4.3.6); (c) A Selection Advisory Panel (SAP) of three members "evaluates all the qualified candidates" (Rule 4.4.7). The initial review by the RSDS is supposed to simplify the work of the SAP, but not to preclude a review of all candidates by the SAP (Rule 4.3.6); (d) Following this review, the SAP makes a recommendation (Rule 4.4.7); (e) The next step in the selection process takes place before the APC or the Appointment and Promotion Board.

IV. The Applicant contends that, in accordance with Rule 4.3.6, all candidates should be reviewed by all the bodies involved in the selection process. The Respondent, on the other hand, claims that only "qualified candidates" should be reviewed by the SAP and the APC. He equates "qualified candidates" with candidates included in the short list drawn up by RSDS. In the Respondent's view, the rest of the candidates would only have their names transmitted to the SAP and the APC. As the Applicant's name was not included in the short list drawn up by RSDS, the Respondent, in accordance with his criteria, merely transmitted it to the SAP, without her application for the post and supporting documentation.

V. In his decision on the JAB report, the Secretary-General clearly admits, referring to the Applicant, that "your name was not submitted to either the Selection Advirosy Panel (SAP) or the Appointment and Placement Committee (APC) as a 'qualified' candidate

... Although your name was submitted as an applicant, full supporting documentation ... was not transmitted to either the SAP or the APC ..."

VI. The Tribunal is called upon to decide whether the procedure followed by the Respondent is in keeping with the provisions of the UNICEF Personnel Administration Manual.

As far as the procedures before the SAP are concerned, the Tribunal finds that the Applicant should have been reviewed by the SAP. Paragraph 4.3.6 of the UNICEF Personnel Administration Manual clearly states that the short list drawn up by RSDS should only "simplify the work of the Selection Advisory Panel but will not preclude a review of all candidates by the Panel" (emphasis added).

It could be argued that the expression "to preclude", used in the rule, makes it optional for the SAP to review all candidates. The Tribunal does not share this view. For, in the next step, i.e. consideration of the candidates by the APC, the rules add, as a proviso, that such review shall be carried out only "as needed" (Rule 4.2.1).

No such proviso exists in connection with the SAP, thus showing that, at that stage, all candidates must be reviewed.

It is clear, therefore, that, in the review before the SAP, the rules, as currently written, draw no distinction between qualified and other candidates. Even those candidates not considered qualified according to the Administration's criterion should be reviewed. The mere submission of their names, if not for review, would serve no useful purpose. Because of the lack of a definition of "qualified", anyone who submits a candidacy, which, on the face of it, meets the requirements of the vacancy notice, must be considered as qualified and must, therefore have his or her candidacy reviewed by the review bodies. The Tribunal recommends that UNICEF should consider amending the current rules to clarify these procedures.

VII. In the Tribunal's view, therefore, the Administration has disregarded the current rules, thus causing harm to the Applicant. The Tribunal finds that, as a result of the SAP's failure to review the Applicant's candidacy, the Respondent denied her the full and fair consideration to which she was entitled under the Tribunal's jurisprudence. In the Tribunal's view, these violations give rise to a right to compensation.

VIII. The Tribunal will not address the question of whether the Applicant should or should not have been reviewed by the APC at the final stage of the selection process. In its view, this would not alter the responsibility already incurred by the Administration through its failure to review the Applicant's candidacy in the SAP.

IX. For the foregoing reasons, the Tribunal orders the Respondent to pay $1,000 to the Applicant.

All other pleas are rejected.

(Signatures)

Luis de POSADAS MONTERO
Vice-President, presiding

Mayer GABAY
Member

Deborah Taylor ASHFORD
Member

Geneva, 26 July 1996

R. Maria VICIEN-MILBURN
Executive Secretary